BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION BELOW.

The opinion directing reversal is reported 130 F. 2d 499, and appears at R. 1987.

II.

JURISDICTION.

The jurisdictional statement, p. 11 herein, is adopted by reference.

III.

STATEMENT OF THE CASE.

The "Summary and Statement of the Matters Involved," pages 1 to 11 herein, is adopted by reference.

IV.

SPECIFICATIONS OF ERROR.

The decision and opinion on appeal erred in each and every respect stated in "Reasons Relied on for Allowance of the Writ," pages 18 to 24 herein, which, for brevity, are adopted by reference as fully as if here printed at length.

V.

SUMMARY OF ARGUMENT.

1. Trial Findings were denied a judicial review. The governing law was not applied in a diversity of citizenship case.

2. Denial of the equitable rules governing assumpsit contravenes decisions of this Court.

3. Duress of property was established under Missouri and Texas law.

4. Deceit in matters solely known to one party is fraud under Missouri law, though opinions, a state of mind or expectations are stated.

5. Contracts relieving liability for fraud in advance are void under Missouri law.

6. Fraud avoids contracts which would not have been made if it was not employed.

7. There was no waiver of fraud, compromise or accord and no estoppel denied recovery of reasonable value.

8. There was either a breach or abandonment of contract. Either, or fraud, duress, uncertainty of subject matter or want of mutuality denied the "contract" as a defense, in an assumpsit action.

9. Certainty of subject matter of contracts is required under Missouri law. The minds of the parties must meet on the same thing, in the same sense, at the same time, or there is no valid contract.

10. Mutuality of obligation does not precede the existence of represented conditions, which are integral to the subject matter of a contract.

11. There was no mutuality in the contract. Performance under compulsion of construction work of different *nature, conditions and unit sizes* was not performance of the falsely represented project.

12. The invalid agreement to pay for changes in concrete forms caused by a change in the plans was not properly construed nor rightfully enforced on appeal.

ARGUMENT.

1. The opinion erred in failing to consider or to judicially review lawful trial Findings and (b) equal protection of laws was denied by failing to declare or apply the governing state law in a diversity of citizenship case. Cases cited in Statement of Jurisdiction, p. 11, and the cases decided by the same Court at the same Term, cited p. 11 herein, are adopted by reference.

2. The denial, on appeal, of the equitable rules governing assumpsit, deprived Petitioner of substantive rights.

Petitioner paid a high premium, for which Phillips benefited, when it waived damages for delay (Finding 23, R. 1916) and damages for fraud, and sued only for the bare value of work performed, to assure mere certain recovery in assumpsit. That error contravenes the decisions of this Court, which also support the right of affirmance.

Guerini Stone Co. v. *P. J. Carlin Const. Co.*, 248 U. S. 334, 343, 63 L. Ed. 275, 284. *Stone* v. *White*, 301 U. S. 532, 534, 81 L. Ed. 1265, 1267. *Phillips & Colby Construction Co.* v. *Seymour*, 91 U. S. 646, 23 L. Ed. 341. The action is equally recognized in Missouri and Texas. 84 A. L. R. 946, and a review of common law authorities in 95 A. L. R. 990. *Gillioz* v. *State Highway Commission*, 153 S. W. 2d 18, 22, Subds. 3, 4 (Mo. Sup.).

3. That Findings 20 and 24 established duress of property, under both Texas and Missouri law, is established by:

Brown v. *Worthington*, 142 S. W. 1082, l. c. 1084, Subds. 1, 2, 162 Mo. App. 508.

Goodrum v. *State*, 158 S. W. 2d 81, l. c. 85, Subds. 1-5 (Tex.), a construction case.

Coercion by economic pressure is recognized here in:

United States v. *Butler*, 297 U. S. 1, l. c. 71, 80 L. Ed. 477, l. c. 490, and in

United States v. *Bethlehem Steel Corp.*, 315 U. S. 289, 86 L. Ed. (Adv.) 521, l. c. 540-543.

The doctrine discussed in Mr. Justice Frankfurter's dissenting opinion in that case is recognized by the majority, although held inapplicable to the United States under the facts.

That the question is one of mixed law and fact to be determined by the court is held in *Schaefer* v. *Fulton Iron Works*, 158 S. W. 2d 452, l. c. 455, Subds. 1-3 (Mo. App.).

4. Controlling Missouri cases rule that false representations of fact solely within the knowledge of one party, although relating to a state of mind, an existing

purpose or to opinions or expectations, are fraud. These cases are ignored by the opinion:

Metropolitan Paving Co. v. *Brown-Crummer Inv. Co.*, 274 S. W. 815, 309 Mo. 638 (*En Banc*) (excerpt printed at length, R. 2025, 2026).

Collins v. *Lindsay*, 25 S. W. 2d 84, l. c. 90 (Mo. Sup.).

Luikart v. *Miller*, 48 S. W. 2d 867, l. c. 868, 869 (Mo. Sup.), which also rules that an evil intent may be implied from a reckless disregard of another's interests.

Judd v. *Walker*, 114 S. W. 979, Subds. 5-6, 215 Mo. 312.

National Theatre Supply Co. v. *Rigney*, 130 S. W. 2d 258 (Mo. App.).

5. Like Missouri cases rule that contract provisions purporting to relieve from liability in advance for authorized fraud are invalid and against public policy:

Rabenau v. *Harrell*, 278 Mo. 247, 213 S. W. 92, l. c. 93, 94, Subd. 7.

Rice v. *Lammers*, 65 S. W. 2d 151, Subds. 3-5 (Mo. App.).

Horwitz v. *Schaper*, 119 S. W. 2d 474, l. c. 480, 482 (Mo. App.).

Progressive Finance Co. v. *Stempel*, 95 S. W. 2d 834, 836 (Mo. App.), Subds. 4-6.

6. Like cases declaring that fraud avoids all contracts where it is shown that if it had not been employed, the contract would not have been made, are:

Taggart v. *School District*, 96 S. W. 2d 335, 337, 339 Mo. 223.

Armstrong v. *Winfrey*, 61 Mo. 354, 357.

7. That there was no waiver of fraud or compromise growing out of the June memorandum is declared in *State ex rel. Cary* v. *Trimble*, 43 S. W. 2d 1050, l. c. 1054. At Record 2035 an excerpt from this case is printed at length, from which it clearly appears plaintiff did not even "receive a drink of cold water" by reason of the June memorandum. See also *Osler* v. *Joplin Life Ins. Co.*, (Mo.) 164 S. W. 2d 295, Subd. 7. That there was no accord by receipt of checks for amounts concededly due

is held by a long line of Missouri cases, cited in Annotation 112 A. L. R. 1224, 1236, 1238, 1239, 1240. Texas and Oklahoma cases cited therein announce the same rule. The first Missouri case cited in Opinion (R. 1993) rules that there is no accord where claims are left open by agreement, but it was not followed on appeal.

8. That there was either a breach or abandonment of the "contract" is clearly established by the controlling cases. *Spitscaufsky* v. *State Highway Commission,* (Mo. Sup.) 159 S. W. 2d 647, 651, Subds. 2, 4, rules that it is a breach of the implied covenants of any construction contract to interfere with orderly progress of the work by failing to supply plans, etc. Material changes or capricious conduct are held to support a *quantum meruit* claim, l. c. 653, 657. *Fuhler* v. *Gohman & Levine Const. Co.,* 142 S. W. 2d 482, l. c. 484, Subds. 1, 2, rules that substantial deviations effect an abandonment of a construction contract.

9. That certainty of the subject matter of a contract is requisite for its validity under Missouri law is declared in: *State ex rel.* v. *Hughes,* 152 S. W. 2d 193, l. c. 196, Col. 1, and Subds. 4-7, l. c. 198 (Mo. Sup.); *McClintock* v. *Skelly Oil Co.,* 114 S. W. 2d 181, l. c. 189, Subds. 6-12, 232 Mo. App. 1204; *Wright* v. *Fuel Oil Co.,* 114 S. W. 2d 959, l. c. 961, 962, 342 Mo. 173; *Rexford* v. *Philippi,* 84 S. W. 2d 628, l. c. 631, Subds. 3, 4, 337 Mo. 389.

That innocent misrepresentations will defeat a meeting of minds is declared in 17 C. J. S. 502, Sec. 147.

That a contract void for uncertainty of subject matter is not validated by part performance or payment is declared in *Jesse* v. *Roloff,* 74 S. W. 2d 890, l. c. 893 (Mo. App.), and in the Missouri cases cited in 17 C. J. S. 762, Sec. 325, n. 37; page 366, n. 78; page 367, n. 92; page 369, n. 1; page 455, n. 85.

10. Cases declaring that where the subject matter of a contract is not ascertainable at its inception, an undertaking that it shall possess certain qualities when ascertained is a condition, the performance of which is precedent to any obligation thereunder, are: *Pope* v. *Allis,* 115 U. S. 363, l. c. 371, 29 L. Ed. 393, l. c. 398; *Redlands Orange G. Assn.* v. *Gorman,* 161 Mo. 203, 61 S. W. 820, l. c. 821, 2d Col.; *Fitzgerald* v. *Barker,* 85 Mo. 13, l. c. 22;

Dale v. *Pierson-Brewen*, 142 S. W. 745, l. c. 747, 160 Mo. App. 314; *Grigsby* v. *Stapleton*, 94 Mo. 423, 7 S. W. 421, 423.

11. That there was no mutuality of obligation in the contract is held in *Spitscaufsky* v. *State Highway Commission*, 159 S. W. 2d 647, 654, subd. 5, 656, subds. 10, 12, and *John P. Mills* v. *Bell*, 37 S. W. 2d 680, l. c. 684 (Mo. App.). That performance of a project of different nature, conditions and unit sizes did not supply mutuality is held in *DeLange* v. *Ogden*, (Tex.) 106 S. W. 2d 385, 391, Subd. 10.

12. The decision on appeal erred in reversing $35,597.18, allowed on implied contract for loss of use and payment for concrete forms and form panels, caused by changes made in the plans. The trial court (although the June memorandum was invalid for fraud and duress), properly construed the language and arrived at the same result, whether it was valid or invalid. He properly followed the *lex fori*. *Wentzel* v. *Lake Lotawana Dev. Co.*, 48 S. W. 2d 185, Subds. 4, 12, to 15 and 33.

Conclusion.

It is respectfully submitted that the questions of substance and of grave importance in the public interests, with the inexplicable denial of lawful rights, contrary to the accepted course of judicial proceedings, demand the intervention of this court, despite its recognized heavy burdens.

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